

April 2018

## Black Lung in the 21st Century: Disease, Law, and Policy

Evan Barrett Smith

*Appalachian Citizens' Law Center*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Health Law and Policy Commons](#)

---

### Recommended Citation

Evan B. Smith, *Black Lung in the 21st Century: Disease, Law, and Policy*, 120 W. Va. L. Rev. (2018).

Available at: <https://researchrepository.wvu.edu/wvlr/vol120/iss3/6>

This Essay on Appalachia is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

**BLACK LUNG IN THE 21ST CENTURY:  
DISEASE, LAW, AND POLICY**

*Evan Barret Smith\**

I.	BLACK LUNG DISEASE: 21ST CENTURY RESURGENCE .....	799
II.	BLACK LUNG LAW: 21ST CENTURY CHANGES IN FEDERAL LAW .....	804
	A. <i>The 2014 Dust Rule</i> .....	804
	B. <i>The Affordable Care Act's "Byrd Amendments"</i> .....	806
	1. ACA Changes to Widows' Claims .....	807
	2. ACA Changes to Miners' Claims .....	807
	C. <i>The 2001 Amendments to the Black Lung     Benefits Regulations</i> .....	809
	D. <i>The 2016 Medical Disclosure Rule</i> .....	810
III.	BLACK LUNG POLICY: 21ST CENTURY OPPORTUNITIES .....	813
	A. <i>A Brief Description of Policy Issues in the Federal     Black Lung Benefits System</i> .....	814
	1. Credibility of Expert Medical Evidence in Black Lung Claims .....	814
	2. Delays in Adjudication of Black Lung Benefits Claims .....	816
	3. Lack of Legal Representation for Claimants .....	817
	4. Three Problems with Proposals for Allowing Settlement of Black Lung Benefits Claims: Medical Benefits and the Statute .....	818
	B. <i>Reducing Delays in the Black Lung Benefits System</i> .....	819
	C. <i>Decoupling Medical Benefits from Black Lung Benefits     and Creating a General Health Insurance Option     for Coal Miners</i> .....	820
IV.	CONCLUSION .....	822

---

\* Staff Attorney at Appalachian Citizens' Law Center; J.D., 2012 University of Pennsylvania Law School; M.P.A., 2012 Fels Institute of Government, University of Pennsylvania; B.A., 2005 Oberlin College. The Author represents coal miners and their families in federal black lung benefits claims. Statements made about the practical aspects of black lung benefits litigation are based on the Author's experience litigating hundreds of black lung benefits claims at all levels of the system over the past five years and regularly covering developments in the law and policy for *Devil in the Dust: A Black Lung Blog*. The Author extends thanks to Dr. A. Scott Laney, Dr. Edward Lee Petsonk, John Cline, and Stephen A. Sanders for their kind assistance and helpful feedback as well as to the editors of the *Law Review*, especially Christine E. Pill and Rebecca Trump.

You should not be reading this: Black Lung in the 21st Century. This topic should be as unnecessary as “Smallpox in the 21st Century” or “Mad Hatter Disease in the 21st Century.” But this topic is necessary. While those diseases have been eradicated from modern life, coal miners continue to suffer from black lung—a disease that is preventable but incurable. And current rates of the disease show a gut-wrenching reversal of 20th century progress.

The past decade has seen many changes in the fields related to black lung. Although American coal production and employment have been declining,<sup>1</sup> more coal miners are suffering from breathing problems related to coal-mine dust.<sup>2</sup> 20th-century efforts to end black lung failed. The Appalachian coalfields are now the epicenter of one of the worst industrial health disasters in U.S. history. Current rates of severe black lung among career Appalachian miners are worse than when federal statistics started being kept in 1970.<sup>3</sup>

While the disease has worsened, the legal system has seen some important improvement. In particular, the past decade has seen four major changes to the federal law concerning black lung. *First*, in 2014, the U.S. Department of Labor (“DOL”) made the first changes since 1972 to the regulations limiting the dust that miners breathe while working underground. The Dust Rule reduces the permissible dust level by 25%, closes important loopholes, and provides miners with better information about their working conditions.<sup>4</sup> *Second*, the Affordable Care Act (“ACA”) contains provisions known as the “Byrd Amendments” that automatically entitle many widows to black lung benefits and provide experienced coal miners suffering from a respiratory disability with a powerful presumption that their disabling breathing problems are due to black lung.<sup>5</sup> *Third*, in 2000, DOL made major revisions to its regulations that went into effect in 2001 and, once ingrained, simplified black lung benefits litigation.<sup>6</sup> *Fourth*, in 2016, DOL mandated that most medical

---

<sup>1</sup> Justice Worland, *Coal's Last Kick*, TIME, [time.com/coals-last-kick](http://time.com/coals-last-kick) (last visited Apr. 2, 2017).

<sup>2</sup> See generally Howard Berkes, *NPR Continues to Find Hundreds of Cases of Advanced Black Lung*, NPR (July 1, 2017, 6:00 AM), <https://www.npr.org/sections/thetwo-way/2017/07/01/535082619/npr-continues-to-find-hundreds-of-cases-of-advanced-black-lung>.

<sup>3</sup> See David J. Blackley et al., *Resurgence of Progressive Massive Fibrosis in Coal Miners – Eastern Kentucky, 2016*, 65 MORBIDITY & MORTALITY WKLY. REP. 1385, 1387 (2016), <https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm6549.pdf>.

<sup>4</sup> See generally Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors, 79 Fed. Reg. 24,814, 24,815–16 (May 1, 2014) (codified at 30 C.F.R. pts. 70, 71, 72, 75, 90).

<sup>5</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 260 (2010); Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits, 78 Fed. Reg. 59,102 (Sept. 25, 2013).

<sup>6</sup> Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79,920 (Dec. 20, 2000).

evidence developed in black lung benefits claims be disclosed to the other parties.<sup>7</sup>

This Article provides an overview of the current medical reality of black lung and recent changes to federal law. It also discusses current policy issues in the black lung benefits system. This Article will argue for two changes to improve the compensation system for those miners who already have the disease. *First*, we must eliminate the delays plaguing the adjudication of federal black lung benefits system. *Second*, we must shift the responsibility of black lung medical benefits from coal operators to a federal health insurance program that covers all coal miners. This would greatly decrease the amount of litigation and provide needed health benefits for a broader group of miners.

Unfortunately, black lung will continue to be a salient topic in Appalachia over the next century. This Article hopes to contribute to an inquiry into how this disease can be eliminated and how compensation can be provided to coal miners and their families in a way that is consistent with the public interest.

## I. BLACK LUNG DISEASE: 21ST CENTURY RESURGENCE

The single most significant recent development in the field of black lung is the skyrocketing resurgence of the disease. As this Part will explain, the first decade of the 21st century suggested that black lung was largely a remnant of historical, pre-regulatory exposures and bad apples in the industry. Unfortunately, the second decade has shown that the country is now facing what Dr. A. Scott Laney recently called “one of the largest industrial medicine disasters that the United States has ever seen.”<sup>8</sup> Rates of severe black lung among career coal miners in Appalachia are now *worse* than in the early 1970s, when the federal government first began trying to eliminate the disease.<sup>9</sup>

Before discussing data regarding black lung, it is worth clarifying just what “black lung” is. Black lung is not a medical term. It is a common phrase referring to a group of breathing disorders from which coal miners can suffer as a result of breathing too much dust from mines.

For centuries, coal miners used folk descriptions such as “miner’s consumption” or “miner’s asthma” for the breathing problems they suffered from.<sup>10</sup> However, these complaints were largely discounted by the medical establishment, many of whom were associated with the coal industry and actually said that coal-mine dust was good for miners’ lungs.<sup>11</sup> It was not until the mid-

---

<sup>7</sup> Black Lung Benefits Act: Disclosure of Medical Information and Payment of Benefits, 81 Fed. Reg. 24,464, 24,480 (Apr. 26, 2016) (codified at 20 C.F.R. § 725.413 (2017)).

<sup>8</sup> Berkes, *supra* note 2.

<sup>9</sup> See Blackley et al., *supra* note 3.

<sup>10</sup> See ALAN DERICKSON, BLACK LUNG: ANATOMY OF A PUBLIC HEALTH DISASTER 8 (1998).

<sup>11</sup> *Id.* at 43.

20th century that researchers identified a disease that they termed “coal workers’ pneumoconiosis,” often abbreviated as CWP.<sup>12</sup> CWP is the “signature disease” form of black lung.<sup>13</sup>

But coal-mine dust also causes disease processes other than the classic pattern of CWP. Early legal compensation programs required that miners prove the presence of CWP. But many miners could not do so even though they suffered from disabling breathing problems that they attributed to coal-mine-dust exposure.<sup>14</sup> This frustration led to simultaneous efforts to expand legal criteria for entitlement to compensation and efforts to do further research into the effect of coal-mine dust on the lungs.<sup>15</sup> The term “black lung” was used by miners and their advocates as an intuitive and accessible phrase to encapsulate breathing problems associated coal-mine dust.<sup>16</sup>

Late-20th-century medical research showed that coal-mine dust not only can cause a signature pattern of pulmonary fibrosis, but also can cause a wide array of diseases that are not limited to coal miners.<sup>17</sup> These findings led to the creation of a new medical term related to black lung: Coal Mine Dust Lung Disease (“CMDLD”). CMDLD is defined as “the spectrum of disease caused by prolonged inhalation of mine dust.”<sup>18</sup> It includes not only long-recognized diseases among miners, such as coal workers’ pneumoconiosis and silicosis, but also dust-related diffuse fibrosis (“DDF”), chronic obstructive pulmonary disease (“COPD”), and even cancer caused by coal-mine dust.<sup>19</sup>

But while the medical community moved towards a more holistic understanding of coal-mine dust’s harms, few expected the resurgence of classic, severe CWP that the past few years have seen. As Dr. Robert Cohen wrote, “[m]ost of us studied these diseases in medical school, but were under the impression that they were relics of a bygone age.”<sup>20</sup>

---

<sup>12</sup> *Id.* at 120–21.

<sup>13</sup> A “signature disease” is a disease that is associated uniquely or almost always with exposure to a particular toxic agent. Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2121 n.16 (1997).

<sup>14</sup> Barbara Ellen Smith, *Black Lung: The Social Production of Disease*, 11 INT’L J. HEALTH SERVS. 343, 353–54 (1981).

<sup>15</sup> *Id.* at 344–53; DERICKSON, *supra* note 10, at 144–82.

<sup>16</sup> DERICKSON, *supra* note 10, at 147–48.

<sup>17</sup> Final Rule, *Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended*, 65 Fed. Reg. 79,920, 79,938–44 (Dec. 20, 2000).

<sup>18</sup> Edward L. Petsonk et al., *Coal Mine Dust Lung Disease: New Lessons from an Old Exposure*, 187 AM. J. RESPIRATORY & CRITICAL CARE MED. 1178, 1178 (2013).

<sup>19</sup> *Id.* at 1178–80.

<sup>20</sup> Robert A. Cohen, *Resurgent Coal Mine Dust Lung Disease: Wave of the Future or a Relic of the Past?*, 73 OCCUPATIONAL & ENVTL. MED. 715, 715 (2016), <http://oem.bmj.com/content/oemed/73/11/715.full.pdf>.

The first decade of the 21st century suggested a disease in drastic decline. Official data showed rates of CWP to be steadily decreasing. Rates of CWP among miners with at least 25 years of experience had dropped from 43.7% in 1970 to 5.4% in 2009.<sup>21</sup> In 2009, the Obama Administration rolled out a disease-prevention effort with the slogan “End Black Lung—Act Now!”<sup>22</sup> It appeared that ending black lung was within sight.

A contrary data point came from the worst mining disaster in four decades. In April 2010, the Upper Big Branch Mine in West Virginia exploded, killing 29 out of 31 miners at the site. Autopsies could be done on the lungs of 24 miners. Surprisingly, 17 of the 24 miners (71%) had CWP. And out of the 17, one was only 25 years old, five had less than 10 years of experience as a coal miner, and all but one worked exclusively under the modern dust limits that had been in place since 1973. The governor’s report called these findings “alarming.”<sup>23</sup> But this random sample of miners came from just one mine with a reputation for flouting mine safety,<sup>24</sup> and some studies showed that small, nonunion mines (such as Upper Big Branch) were worse for miners’ lungs.<sup>25</sup>

In 2014, the U.S. Center of Disease Control’s National Institute for Occupational Safety and Health (“NIOSH”) released startling data from its Coal Workers’ Health Surveillance Program.<sup>26</sup> The data looked at rates of an advanced form of CWP known as “progressive massive fibrosis” (PMF) or “complicated pneumoconiosis.”<sup>27</sup> PMF rates are notable because they are a proxy for excessive dust exposure, similar to how deaths from drug overdoses suggest underlying

<sup>21</sup> CWXSP: *Number and Percentage of Examined Underground Miners with Coal Workers’ Pneumoconiosis (ILO Category 1/0+) by Tenure, 1970–2009*, CDC (Apr. 1, 2011), <https://wwwn.cdc.gov/eworld/Data/569>.

<sup>22</sup> See, e.g., *End Black Lung ACT NOW!*, U.S. DEP’T LABOR: MINE SAFETY AND HEALTH ADMIN., <https://arlweb.msha.gov/S&HINFO/BlackLung/Homepage2009.asp> (last visited Apr. 2, 2018).

<sup>23</sup> See J. DAVITT MCATEER ET AL., *UPPER BIG BRANCH: THE APRIL 5, 2010, EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES* 32 (2011), <https://www.npr.org/documents/2011/may/giip-massey-report.pdf>.

<sup>24</sup> See *United States v. Blankenship*, 846 F.3d 663, 667 (4th Cir. 2017).

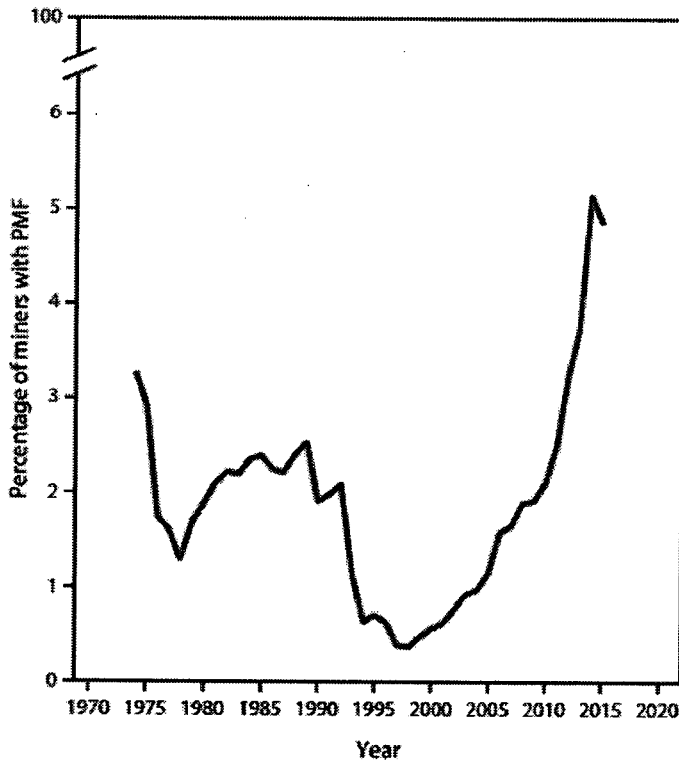
<sup>25</sup> David J. Blackley et al., *Small Mine Size Is Associated with Lung Function Abnormality and Pneumoconiosis Among Underground Coal Miners in Kentucky, Virginia and West Virginia*, 71 *OCCUPATIONAL & ENVTL. MED.* 690, 690 (2014), <http://oem.bmj.com/content/oemed/71/10/690.full.pdf>. This study confirmed longstanding anecdotal reports about dust conditions in small, nonunion mines. See, e.g., Gardiner Harris & Ralph Dunlop, *A Disease’s Deadly Grip*, *COURIER-JOURNAL*, Apr. 19, 1998, at 1.

<sup>26</sup> See David J. Blackley et al., *Resurgence of a Debilitating and Entirely Preventable Respiratory Disease Among Working Coal Miners*, 190 *AM. J. RESPIRATORY & CRITICAL CARE MED.* 708, 708–09 (2014), <https://www.atsjournals.org/doi/abs/10.1164/rccm.201407-1286LE#readcube-epdf>.

<sup>27</sup> *Id.* at 709.

addiction rates.<sup>28</sup> NIOSH announced that although its data showed that the disease had been virtually eradicated by the year 2000 (with PMF rates of just 0.08% among all miners), data as of 2012 showed that the rate among experienced miners in Kentucky, Virginia, and West Virginia had jumped up to 3.23%.<sup>29</sup> The rate was equivalent to the earliest NIOSH data—when federal regulation of dust conditions in coal mines was just beginning.

The news in 2016 was only worse. First, NIOSH released updated data showing that disease rates in the same group of miners reported on in 2012 were now over 5%—*higher* than the earliest data.<sup>30</sup>



**“Figure 1. Prevalence of progressive massive fibrosis (PMF)\* among underground-working coal miners with  $\geq 25$  years of underground mining tenure — Coal Workers’ Health Surveillance Program, Kentucky, Virginia, and West Virginia, 1974–2016”<sup>31</sup>**

<sup>28</sup> See Samuel Brown Petsonk & Anne Marie Lofaso, *Working for Recovery: How Civil Rights Laws Can Facilitate Successful Rehabilitation for Alcoholics and Drug Addicts*, 120 W. VA. L. REV. 891, 892–93 (2018).

<sup>29</sup> Blackley et al., *supra* note 26, at 709.

<sup>30</sup> Blackley et al., *supra* note 3, at 1387.

<sup>31</sup> *Id.*

Second, at the same time, NIOSH researchers and a practicing radiologist (Dr. J. Brandon Crum) published recent data from that radiologist's practice showing 60 more miners with PMF in 2015 and 2016 in eastern Kentucky and southwest Virginia where Dr. Crum practices. This number was significant because NIOSH's official data only reported 99 miners nationwide with PMF from 2011 to 2016.<sup>32</sup>

The official NIOSH data is based on miners' voluntary participation in NIOSH's surveillance program, which is targeted towards active miners.<sup>33</sup> For a variety of reasons, many active miners decline to participate.<sup>34</sup> NIOSH reported that only 17% of Kentucky miners from 2011 to 2016 participated.<sup>35</sup>

Third, an investigation by National Public Radio ("NPR") showed that Dr. Crum's practice was not unique. Reporters visited black lung clinics, physicians, and attorneys across the country and obtained data from 17 sources in Ohio, Pennsylvania, West Virginia, Virginia, and Kentucky. They identified "nearly 2,000" miners with PMF, all of whom were diagnosed since 2010.<sup>36</sup> Considering that NIOSH data only recognized 99 cases nationwide, NPR's limited search found PMF at a rate 20 times higher than the official count. Since then, NIOSH has been working with black lung clinics to document these cases, resulting in official identification of "the largest cluster of PMF reported in the scientific literature": 416 coal miners with severe black lung from a group of clinics in southwest Virginia.<sup>37</sup>

As NIOSH researcher Dr. Laney recently stated to the National Academy of Sciences, "we are in the midst of an epidemic of black lung disease in Central Appalachia that is historically unparalleled."<sup>38</sup>

Instead of marking the end of black lung, the 21st century sees the disease advancing. This begs the question *why*? The simple answer is that coal miners have been breathing too much dust. That has been the case due to multiple causes including: (1) legal dust limits being set too high and riddled with

<sup>32</sup> *Id.* at 1386.

<sup>33</sup> A. Scott Laney et al., *Radiographic Disease Progression in Contemporary US Coal Miners with Progressive Massive Fibrosis*, 74 OCCUPATIONAL & ENVTL. MED. 517, 518–19 (2017), <http://oem.bmj.com/content/oemed/early/2017/04/13/oemed-2016-104249.full.pdf>.

<sup>34</sup> These reasons warrant further attention, but, in short, the most commonly cited reasons are worries about discrimination on the job, about triggering statutes of limitations for potential compensation claims, and about knowing their own disease status. *Id.*

<sup>35</sup> Blackley et al., *supra* note 3, at 1387.

<sup>36</sup> Berkes, *supra* note 2.

<sup>37</sup> David J. Blackley et al., *Progressive Massive Fibrosis in Coal Miners from 3 Clinics in Virginia*, 319 J. AM. MED. ASS'N 500, 501 (2018), <https://jamanetwork.com/journals/jama/fullarticle/2671456>.

<sup>38</sup> Berkes, *supra* note 2.



loopholes;<sup>39</sup> (2) even these limits being ignored, often fraudulently;<sup>40</sup> (3) engineering advances that allow mining equipment to churn through the earth more quickly and, in doing so, create more respirable dust;<sup>41</sup> (4) geologic differences in the seams of coal currently being mined that result in exposure to dust that is more toxic;<sup>42</sup> and (5) changes in business organization and staffing of the coal industry that favor smaller companies employing fewer miners who work more overtime, resulting in exposure to more dust *and* less time to rest and clear themselves of dust.<sup>43</sup> But however these causes and others are ranked, it is clear that black lung is still a fact of life—and death—for American coal miners.

## II. BLACK LUNG LAW: 21ST CENTURY CHANGES IN FEDERAL LAW

At the same time that black lung disease resurged, federal law has experienced four major changes since 2000 related to the disease. This summary of these changes provides a silver lining for current miners and those seeking benefits.

### A. *The 2014 Dust Rule*

The most notable change aiming to reverse the resurgence of black lung was the Dust Rule that DOL's Mine Safety and Health Administration ("MSHA") finalized in 2014. The Dust Rule essentially makes two changes to the law.

<sup>39</sup> See *infra* Section II.A.

<sup>40</sup> See, e.g., Carrie Arnold, *A Scourge Returns: Black Lung in Appalachia*, 124 ENVTL. HEALTH PERSPS. A13, A17 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4710586/pdf/ehp.124-A13.pdf> (providing account of mine foreman who says that "coal mine officials instructed him to alter measurements of dust levels in the mines" and that they were given advance notice of inspections); Gardiner Harris, *Cheating on Coal-Dust Tests Widespread at Nation's Mines*, COURIER-JOURNAL, Apr. 19, 1998, at 7 (providing account of coal miner helping conceal dangerous mining through sandstone to keep his job); Dave Jamieson, *The War on Coal Miners: How Companies Hide the Threat of Black Lung from Watchdogs and Workers*, HUFFPOST (Dec. 6, 2017, 10:15 PM), [https://www.huffingtonpost.com/2014/05/29/black-lung-disease-kentucky-coal-dust\\_n\\_5368878.html](https://www.huffingtonpost.com/2014/05/29/black-lung-disease-kentucky-coal-dust_n_5368878.html) (providing account of coal mine being caught cheating on dust samples after coal miner acted as whistleblower).

<sup>41</sup> See Stephen A. Sanders, *Black Lung Benefits for Disabled Coal Miners and Their Families*, 46 J. POVERTY L. & POL'Y 476, 477 n.4 (2013), [http://povertylaw.org/files/docs/article/chr\\_2013\\_mar\\_apr\\_sanders.pdf](http://povertylaw.org/files/docs/article/chr_2013_mar_apr_sanders.pdf).

<sup>42</sup> Laney et al., *supra* note 33, at 655.

<sup>43</sup> Blackley et al., *supra* note 25, at 690. The increased number of hours worked per miner is shown by Mine Safety and Health Administration data. See *Average Number of Mine Employees, U.S. DEP'T LABOR: MINE SAFETY & HEALTH ADMIN.*, [https://www.msha.gov/sites/default/files/Data\\_Reports/Charts/Average\\_Number\\_of\\_mine\\_employees\\_mine\\_employee\\_hours\\_worked\\_and\\_coal\\_production\\_1978-2015.pdf](https://www.msha.gov/sites/default/files/Data_Reports/Charts/Average_Number_of_mine_employees_mine_employee_hours_worked_and_coal_production_1978-2015.pdf) (last visited Apr. 2, 2018).

First, it reduces by 25% the maximum legal concentration of dust. Since 1972, the legal dust limit had been 2.0 mg/m<sup>3</sup>.<sup>44</sup> In 2010, MSHA proposed changes to its regulations to enact NIOSH's recommendation of 1.0 mg/m<sup>3</sup>.<sup>45</sup> Following significant comments from a variety of stakeholders, the final rule was a compromise between the public health experts' recommendation and the status quo. MSHA promulgated a 1.5 mg/m<sup>3</sup> standard.<sup>46</sup> Because the 1.5 mg/m<sup>3</sup> standard did not actually go into effect until August 1, 2016, and black lung usually takes years to develop, it is too early to know whether the final 1.5 mg/m<sup>3</sup> limit is low enough. MSHA recognized that there are "remaining risk[s] at the final standard" but said that the second category of changes "diminish these risks."<sup>47</sup>

The second category of changes closed significant loopholes in the prior dust regulations by changing the way that dust samples are taken and considered. The regulations mandate use of a device known as a continuous personal dust monitor ("CPDM").<sup>48</sup> Previously, dust conditions were determined using dust pumps that sucked in mine air and caught dust on paper filters that had to be sent to a lab, which would provide results about a week later.<sup>49</sup> The CPDM gives real-time information to miners and provides better longitudinal data so that regulators will know whether there were short violations that might be missed by averaging the dust on a filter over the total period that the filter was on the pump.

The rule also closed major loopholes in the dust regulations that could have resulted in miners being exposed to dust levels beyond even the prior 2.0 mg/m<sup>3</sup> standard. One was the prior "averaging method."<sup>50</sup> Under the old standards, when a coal operator took its required samples, if one of the samples showed an exceedance, this was not considered a violation. It was only a violation if an average of five samples showed an exceedance. This encouraged operators to push the limits because they knew that they could slow back down before receiving a violation. The 2014 Dust Rule closed this loophole and others. The estimated net benefit of the reduction in black lung minus compliance costs is \$12.1 million per year.<sup>51</sup>

---

<sup>44</sup> *In re Howard*, 570 F.3d 752, 754–56 (6th Cir. 2009) (providing history of dust limits).

<sup>45</sup> Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors, 75 Fed. Reg. 64,412, 64,419 (Oct. 19, 2010).

<sup>46</sup> Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors, 79 Fed. Reg. 24,814, 24,815 (May 1, 2014) (codified at 30 C.F.R. § 71.100).

<sup>47</sup> *Id.* at 24,832.

<sup>48</sup> *Id.* at 24,815.

<sup>49</sup> *Id.* at 24,859–60.

<sup>50</sup> *Id.* at 24,815.

<sup>51</sup> *Id.* at 24,960.

The rule was contentious when promulgated and continues to be. The industry lost a court challenge to the validity of the rule<sup>52</sup> but redirected its energy into political challenges. In December 2017, the Trump Administration announced its intention to perform a retrospective review of the Dust Rule, which could be a first step towards rolling it back.<sup>53</sup>

Even if the Dust Rule remains law, its effect will depend on its enforcement. The Dust Rule is not self-enforcing. Without meaningful inspections and penalties by MSHA, the coal industry cannot be expected to prioritize safety measures over production.<sup>54</sup> The continuous personal dust monitor should provide valuable information to individual whistleblowers, but the system should not require miners to risk retaliation to avoid a life of black lung.

### *B. The Affordable Care Act's "Byrd Amendments"*

Major changes have been made to federal black lung benefits law.<sup>55</sup> The most notable was a part of the ACA in 2010.<sup>56</sup> Senator Robert Byrd of West Virginia inserted language—known as the “Byrd Amendments”—that made federal black lung benefits law more favorable for black lung widows<sup>57</sup> and for disabled career coal miners. Both changes restored provisions of the Black Lung Benefits Act that had been ended by legislation in 1981.<sup>58</sup>

<sup>52</sup> See *Nat'l Mining Ass'n v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 843 (11th Cir. 2016).

<sup>53</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, RIN NO. 1219-AB88, REQUEST FOR INFORMATION, REGULATORY REFORM OF EXISTING STANDARDS AND REGULATIONS; RETROSPECTIVE STUDY OF RESPIRABLE COAL MINE DUST RULE (2017), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1219-AB88>.

<sup>54</sup> Dust controls require coal companies to assign miners to nonproduction tasks such as hanging a ventilation curtain to help bring clean air to the face of the mine or laying pipe to supply water sprays to keep dust down. Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors, 79 Fed. Reg. 24,814, 24,873 (May 1, 2014). This has a short-term cost, even though in the long-term, safer mines are more productive. See S. Rep. No. 95-181, at 5 (1977), as reprinted in 1977 U.S.C.A.N. 3401, 1977; Taylor Kuykendall & Hira Fawad, *Latest Numbers Suggest Unionized Coal Mines Safer, More Productive Than Nonunion Operations*, S&P GLOBAL (Mar. 30, 2015, 10:06 AM), <https://www.snl.com/InteractiveX/Article.aspx?cid=A-31867608-11563>.

<sup>55</sup> For an introduction to the black lung benefits system, see Sanders, *supra* note 41, at 476–77.

<sup>56</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 260 (2010).

<sup>57</sup> The law applies equally to all survivor's claims, but, practically speaking, the vast majority of survivor's claims are filed by widows, and the remaining minority is filed by qualifying children. See 20 C.F.R. §§ 725.212–218 (2017).

<sup>58</sup> *Vision Processing, LLC v. Groves*, 705 F.3d 551, 553 (6th Cir. 2013) (providing a brief statutory history of the Black Lung Benefits Act).

### 1. ACA Changes to Widows' Claims

The ACA revived the “automatic entitlement” provision, which means that if a miner who was awarded federal black lung benefits dies, his widow can automatically be awarded survivor’s benefits.<sup>59</sup> Previously, even when a miner had proven that he was disabled due to black lung, his widow had to prove that his black lung was a sufficient cause of his death.<sup>60</sup> And because most infirm people suffer from multiple health problems before dying, litigation over the cause of the miner’s death was often difficult, protracted, and out of proportion to the benefits, currently \$660.10 per month.<sup>61</sup> It is fitting that the ACA referred to the section as “*Equity for Certain Eligible Survivors*.”<sup>62</sup>

### 2. ACA Changes to Miners' Claims

The change made to miners’ claims<sup>63</sup> is more complex and consequential. The ACA revived the rebuttable 15-year presumption.<sup>64</sup> Essentially, if a claimant can prove that he is disabled due to a respiratory impairment and worked at least 15 years in dusty mines, the presumption shifts the burden to the party opposing benefits to show that the miner does *not* have black lung playing a part in his disability.<sup>65</sup> The 15-year presumption has reshaped black lung benefits litigation<sup>66</sup> because, as the Fourth Circuit has stated, “[t]he existence and causes of pneumoconiosis are difficult to determine.”<sup>67</sup> That is, because most black lung claims present battles of the experts between physicians who disagree about whether a miner has disabling pneumoconiosis, and because this disagreement exists where the determination of who is right is

<sup>59</sup> 30 U.S.C. § 932(l) (2012).

<sup>60</sup> *Groves*, 705 F.3d at 553.

<sup>61</sup> See *Division of Coal Mine Workers' Compensation (DCMWC): Benefits Rates Under Part C, 1973–2018*, U.S. DEP'T LABOR, [https://www.dol.gov/owcp/dcmwc/benefits\\_part\\_c.htm](https://www.dol.gov/owcp/dcmwc/benefits_part_c.htm) (last visited Apr. 2, 2018).

<sup>62</sup> See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 260 (2010) (emphasis added).

<sup>63</sup> To be accurate, the ACA’s revival of the 15-year presumption affects not only miners’ claims, but also some widows’ claims. See 20 C.F.R. § 718.305 (2017). However, the number of affected widows’ claims is relatively small, and the effect of the presumption is somewhat confusing. *Id.* For simplicity, this Article will refer to the 15-year presumption solely with regard to miners’ claims.

<sup>64</sup> 30 U.S.C. § 921(c)(4) (2012).

<sup>65</sup> 20 C.F.R. § 718.305 (2017).

<sup>66</sup> See Patrick R. Baker, *The Black Lung Benefits Program: Debunking the Myths Surrounding Settlement*, 10 APPALACHIAN NAT. RESOURCES L.J. 1, 6 (2016) (observing that the “15-year presumption . . . has substantially increased miners’ success”).

<sup>67</sup> *Hobet Mining, L.L.C. v. Epling*, 783 F.3d 498, 501 (4th Cir. 2015) (quoting *Broyles v. Director, OWCP*, U.S. Dep’t of Labor, 824 F.2d 327, 328 (4th Cir. 1987)).

difficult, the legal question of which party has the burden often proves outcome determinative.

The effect of the presumption is particularly notable for coal miners who have a history of smoking cigarettes. Both cigarette smoke and coal-mine dust cause forms of COPD such as emphysema and chronic bronchitis.<sup>68</sup> Under current science it is very difficult, if not impossible, for a physician to offer a credible opinion to differentiate the relative role of each toxin.<sup>69</sup> And when credible evidence is lacking, the party with the burden loses.

The effect on federal black lung practice has been major. Although there is not a dataset comparing the effect of the 15-year presumption on the outcome of claims for miners who qualify for it, a review of available decisions shows that once a claimant invokes the presumption, it will almost certainly result in an award of benefits.<sup>70</sup> And in many of those cases, the miner had a previous black lung claim that was denied based on very similar medical evidence. The difference in the outcome is often due to the statutory change.<sup>71</sup>

The coal industry's lawyers are predictably frustrated by this, but Congress's policy decision to "relax"<sup>72</sup> the burden for those miners who suffer from a respiratory disability after a career in the mines has proven immune to legal challenge.<sup>73</sup> And politically, the 15-year presumption appears relatively secure. In 2017, when President Trump and the congressional Republicans sought to repeal the ACA, none of the bills would have affected the Byrd Amendments. Rather, one of the bills introduced by Senate Republicans sought to explicitly preserve the Byrd Amendments.<sup>74</sup> The Byrd Amendments appear to be a stable part of black lung benefits law.

---

<sup>68</sup> Petsonk et al., *supra* note 18, at 1180, 1183.

<sup>69</sup> *See id.* at 1183.

<sup>70</sup> "Almost certainly" because the presumption can be rebutted. *See, e.g.,* Duncan v. Cam Mining, No. 17-0234 BLA, 2017 WL 6943178, at \*1, \*4 (Ben. Rev. Bd. Dec. 28, 2017) (affirming ALJ's finding that the employer rebutted presumption).

<sup>71</sup> *See, e.g.,* E. Associated Coal Corp. v. Director, OWCP [Toler], 805 F.3d 502, 515 (4th Cir. 2015) (affirming miner's award in post-ACA case even though miner's pre-ACA claim based on similar evidence was denied and affirmed by the Fourth Circuit).

<sup>72</sup> S. Rep. 92-743 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 2305, 2306.

<sup>73</sup> *See, e.g.,* Helen Mining Co. v. Elliott, 859 F.3d 226, 232–33 (3d Cir. 2017); W. Va. CWP Fund v. Bender, 782 F.3d 129, 133 (4th Cir. 2015); Antelope Coal Co. v. Goodin, 743 F.3d 1331, 1334–35 (10th Cir. 2014); Big Branch Res., Inc. v. Ogle, 737 F.3d 1063, 1066–67 (6th Cir. 2013); Consolidation Coal Co. v. Director, OWCP [Bailey], 721 F.3d 789, 793–95 (7th Cir. 2013).

<sup>74</sup> Patient Freedom Act of 2017, S.191, 115th Cong. § 101(b)(4) (2017); *see also* Evan B. Smith, *Byrd Amendments Update: Senate Republicans Introduce Bill Protecting Black Lung Improvements & Analysis of Executive Order 13,765 Concerning the Affordable Care Act*, DEVIL IN THE DUST: A BLACK LUNG BLOG (Jan. 26, 2017), <http://www.blacklungblog.com/2017/01/byrd-amendments-update-senate-republicans-introduce-bill-protecting-black-lung-improvements-analysis-of-executive-order-13765-concerning-the-affordable-care-act/>.

### C. *The 2001 Amendments to the Black Lung Benefits Regulations*

Apart from the ACA, the next most significant recent change in black lung benefits litigation is DOL's 2001 amendments to the regulations governing claims.<sup>75</sup> After extensive stakeholder participation and multiple proposed versions,<sup>76</sup> the final rule was promulgated in 2000 during the final weeks of the Clinton Administration, but it was not set to go into effect until 2001. Two changes made by the amendments have proven particularly notable.<sup>77</sup>

First, DOL set quantitative limits on the amount of medical evidence that parties can submit in support of their position.<sup>78</sup> These limits were created because claimants were often overwhelmed with industry lawyers' medical evidence.<sup>79</sup> The evidentiary limits sought to "level the playing field" and simplify the adjudication of claims.<sup>80</sup> Although these limits were initially contested fiercely,<sup>81</sup> they are now ingrained into black lung benefits litigation and rarely a point of dispute.

Second, DOL recognized that obstructive pulmonary diseases (e.g., COPD) can constitute compensable pneumoconiosis under the Black Lung Benefits Act. The agency did this by codifying "legal pneumoconiosis" as distinct from "clinical pneumoconiosis."<sup>82</sup> The rule showed that the medical and legal consensus of what breathing problems coal miners suffer from had shifted.

<sup>75</sup> Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79,920 (Dec. 20, 2000).

<sup>76</sup> In 1997, DOL proposed changing the black lung benefits regulations. Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 62 Fed. Reg. 3,338 (Jan. 22, 1997). Following significant comments, the rule was revised and re-proposed in 1999. Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 64 Fed. Reg. 54,966 (Oct. 8, 1999).

<sup>77</sup> For a thorough discussion of the changes, see Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025 (2002).

<sup>78</sup> See Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79,920, 80,074–76 (Dec. 20, 2000) (codified at 20 C.F.R. § 725.414).

<sup>79</sup> See, e.g., *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 948 (4th Cir. 1997) (affirming denial of benefits involving 107 exhibits submitted by the employer); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993) (reversing denial of benefits involving 38 x-ray readings and stating that this "cumulative evidence inquiry . . . reveals certain policy flaws in the adjudication of claims that typically operate to disadvantage Black Lung Benefits Act claimants" and stating that "[i]f such a system continues unchecked, justice will not be served, while moneyed interests thrive").

<sup>80</sup> Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3,338, 3,372 (Jan. 22, 1997).

<sup>81</sup> See *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 873–74 (D.C. Cir. 2002); see also William S. Mattingly, *If Due Process Is a Big Tent, Why Do Some Feel Excluded from the Big Top?*, 105 W. VA. L. REV. 791, 794 (2003).

<sup>82</sup> See 20 C.F.R. § 718.201(a) (2017). This codification was more of a clarification than a true change. Courts had previously recognized that "statutory" pneumoconiosis was broader than what

In finalizing the rule, DOL provided a 126-page “preamble” that explained its view on why science supported its final regulations.<sup>83</sup> This document has proven hugely influential in black lung benefits litigation because it discusses the relevant medical literature in detail and provides a thorough resource that is often directly relevant to how difficult medical questions should be resolved in individual black lung benefits claims. Thus, the agency’s 2001 amendments simplified black lung benefits litigation not only by changing the law regarding the amount of admissible evidence, but also by providing an analysis of frequently litigated medical issues that courts have described as a “scientific primer”<sup>84</sup> and a “medical authority” representing a “consensus among scientists and researchers.”<sup>85</sup>

#### D. The 2016 Medical Disclosure Rule

The most recent significant change in federal black lung benefits law is DOL’s 2016 promulgation of a mandatory medical disclosure rule for parties litigating claims.<sup>86</sup> The rule requires the disclosure of “any written medical data, including data in electronic format, about the miner that a party develops in connection with a claim for benefits.”<sup>87</sup> It was prompted by a pattern of attorneys’ hiding medical evidence. This pattern was brought to public attention by Pulitzer Prize-winning reporting.<sup>88</sup>

---

the medical community referred to as pneumoconiosis and pneumoconiosis under the Black Lung Benefits Act could include obstructive impairments. *Freeman United Coal Mining Co. v. Shelton*, 957 F.2d 302, 303 (7th Cir. 1992) (stating that the “black lung statute has been interpreted to define coal workers’ pneumoconiosis in accordance with . . . the broader[] view, as any chronic lung disease caused in whole or in part by exposure to coal dust”); *see also* *Warth v. S. Ohio Coal Co.*, 60 F.3d 173, 174–75 (4th Cir. 1995) (holding that COPD can be “pneumoconiosis”); Timothy F. Cogan, *Is the Doctor Hostile? Obstructive Impairments and the Hostility Rule in Federal Black Lung Claims*, 97 W. VA. L. REV. 1003, 1012–18 (1995) (discussing case law related to obstructive impairments and legal definition of pneumoconiosis); William S. Mattingly, *Black Lung Update: The Evolution of the Current Regulations and the Proposed Revolution*, 100 W. VA. L. REV. 601, 602–08 (1998) (same).

<sup>83</sup> Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79,920, 79,920–80,045 (Dec. 20, 2000).

<sup>84</sup> *Blue Mountain Energy v. Director, OWCP [Gunderson]*, 805 F.3d 1254, 1261 (10th Cir. 2015).

<sup>85</sup> *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726 (7th Cir. 2008).

<sup>86</sup> Black Lung Benefits Act: Disclosure of Medical Information and Payment of Benefits, 81 Fed. Reg. 24,464, 24,480 (Apr. 26, 2016) (codified at 20 C.F.R. § 725.413 (2017)).

<sup>87</sup> 20 C.F.R. § 725.413(a).

<sup>88</sup> *See* Chris Hamby, *Breathless and Burdened: Coal Industry’s Go-To Law Firm Withheld Evidence of Black Lung, at Expense of Sick Miners*, CTR. PUB. INTEGRITY (Aug. 6, 2014, 5:53 PM), <https://www.publicintegrity.org/2013/10/29/13585/coal-industrys-go-law-firm-withheld-evidence-black-lung-expense-sick-miners>.

The problem was exemplified by the case of a West Virginia coal miner, Gary Fox. In 1999, Mr. Fox filed a black lung claim. He had not been able to find an attorney. DOL's examination found PMF on x-ray<sup>89</sup>—a diagnosis which, if correct, would entitle Mr. Fox to lifetime benefits.<sup>90</sup> The coal company who would be liable for benefits fought the claim and hired the prominent defense firm Jackson Kelly PLLC.<sup>91</sup> During the litigation, Mr. Fox submitted a 1998 report by a pathologist (Dr. Gerald Koh) who reviewed a biopsy but did not diagnose black lung.

The defense attorneys then had the biopsy samples reviewed by pathologists of their choosing, who wrote reports saying that the biopsy showed that Mr. Fox *did* have black lung—and it was the severe form, PMF.<sup>92</sup> They also sent the biopsy to a pathologist at Johns Hopkins, but this pathologist did not produce a report.<sup>93</sup>

The defense firm filed away the pathology evidence that would hurt its client's position. The firm then sent Dr. Koh's pathology report to pulmonologists who reviewed the report and said that Mr. Fox did not have black lung.<sup>94</sup> In 2001, an Administrative Law Judge ("ALJ") denied Mr. Fox's claim based on Dr. Koh's report and the defense firm's pulmonologists' reports of no pneumoconiosis.<sup>95</sup> Afterwards, Mr. Fox, needing income, went back to work underground, where he was exposed to more coal-mine dust.<sup>96</sup>

In 2006, Mr. Fox retained an attorney (John Cline) and filed another claim. Mr. Fox's attorney, overcoming attorney work-product objections, uncovered the previously-withheld pathology reports. In response, the coal company conceded liability for Mr. Fox's current claim. But Mr. Fox wanted to do more than win; he sought to reopen the previous denial to be eligible for more past-due benefits—and, more importantly, to shed light on the coal industry's litigation behavior. Although an ALJ found that Jackson Kelly's litigation conduct was "fraud on the court," justifying reopening Mr. Fox's prior denial, Jackson Kelly won on appeal.<sup>97</sup>

<sup>89</sup> *Id.*

<sup>90</sup> See 30 U.S.C. § 921(c)(3) (2012); 20 C.F.R. § 718.304 (2017).

<sup>91</sup> See Hamby, *supra* note 88.

<sup>92</sup> *Id.*

<sup>93</sup> Joint App'x (Vol. II) at 384, Fox v. Elk Run Coal Co., 739 F.3d 131 (4th Cir. 2014) (No. 12-2387).

<sup>94</sup> Hamby, *supra* note 88.

<sup>95</sup> Decision and Order Denying Benefits, Fox v. Elk Run Coal Co., Case No. 2000-BLA-598, 13 (Dep't of Labor Jan. 5, 2001).

<sup>96</sup> Hamby, *supra* note 88.

<sup>97</sup> Fox *ex rel.* Fox v. Elk Run Coal Co., 739 F.3d 131, 140 (4th Cir. 2014).



Mr. Fox died in 2009 at the age of 59 due to problems related to his black lung.<sup>98</sup> The denial of his prior claim meant that he had to go back to dusty work and did not get the medical benefits he needed. Mr. Fox did not receive justice until he hired an attorney, and then only a sort of half-justice—he could only receive compensation back to 2001, when the defense firm’s tactics won the day.

Mr. Fox’s case is a tragic exemplar of an endemic practice.<sup>99</sup> DOL responded to the issue in 2016 by mandating that parties involved in black lung benefits claims litigation disclose medical evidence developed for the claim. Although the rule has been in effect for nearly two years,<sup>100</sup> it is still too early to determine whether the rule achieves its goals—reaching more accurate decisions in claims and providing coal miners with more information about their health.

One reason to temper optimism around the rule is that it provides an exception for oral communications from medical professionals<sup>101</sup> and for all communications from the attorney to the medical expert.<sup>102</sup> This incentivizes knowledgeable attorneys to send materials to experts for review and then have an oral discussion about the results to ensure only favorable results are written.

Another concern relates to who receives the information and the evidentiary limits imposed by the 2001 amendments to the regulations. The disclosure rule says that evidence is to be sent “to all other parties,” *not* the ALJ.<sup>103</sup> And even if the ALJ receives it, adjudicators do not consider all evidence that may come across their desk. Rather, a party must designate it as evidence.<sup>104</sup> This can be detrimental to *pro se* litigants because many will assume that when they receive medical evidence from the lawyer on the other side, the judge also received that evidence and will take it into account when deciding their case. If a claimant needs an attorney knowledgeable about black lung law for disclosed

<sup>98</sup> Hamby, *supra* note 88.

<sup>99</sup> Black Lung Benefits Act: Disclosure of Medical Information and Payment of Benefits, 81 Fed. Reg. 24,464, 24,472 (Apr. 26, 2016) (stating that “the issue of withholding medical information generated by non-testifying experts has persistently recurred in black lung claims” and providing seven other examples); Black Lung Benefits Act: Disclosure of Medical Information and Payment of Benefits, 80 Fed. Reg. 23,743 (Apr. 29, 2015) (providing three other examples); Letter from John Cline, Attorney, to Michael Chance, Director, U.S. Dep’t of Labor (June 29, 2015), <http://www.regulations.gov/contentStreamer?documentId=WCPO-2015-0002-0019&attachmentNumber=1&disposition=attachment&contentType=pdf> (providing six other examples); Murchison, *supra* note 77, at 1028–32 (telling the story of Harold Terry’s case).

<sup>100</sup> Black Lung Benefits Act: Disclosure of Medical Information and Payment of Benefits, 81 Fed. Reg. 24,464, 24,465 (stating that the effective date was May 26, 2016).

<sup>101</sup> 20 C.F.R. § 725.413(a) (2017). The preamble to the rule made this explicit. Black Lung Benefits Act: Disclosure of Medical Information and Payment of Benefits, 81 Fed. Reg. 24,464, 24,473 (stating that “the rule is not intended to cover oral communications”).

<sup>102</sup> 20 C.F.R. § 725.413(b)(2) (2017).

<sup>103</sup> *Id.* § 725.413(d).

<sup>104</sup> *Id.*

evidence to be considered by the adjudicator, this weakens the goal of more accurate decisions in *pro se* claims.

Still, the disclosure rule is a step in the right direction. It makes the exchange of medical information the default rather than something that must be sought through discovery. It signals that agency policy favors disclosure.<sup>105</sup> And, perhaps most importantly, it should provide claimants with information about their health.

This Part has provided an overview of four major changes to federal law related to black lung. The ACA's "Byrd Amendments" and DOL's 2001 amendments to the regulations governing black lung benefits claims have already made claim litigation simpler and friendlier to coal miners and their families. The 2016 medical disclosure rule has the potential to make benefits litigation more just and informative, but it also contains loopholes. The legal change with the greatest potential to truly shift the direction of black lung is MSHA's 2014 Dust Rule. By reducing the amount of dust to which coal miners can legally be exposed, the rule could slow or reverse the resurgence of black lung discussed above in Part I. At present, the future of the rule is in doubt. Even if it stays on the books, the rule is not self-enforcing and will require MSHA to ensure that the rule meets its potential.

### III. BLACK LUNG POLICY: 21ST CENTURY OPPORTUNITIES

The policy issues in the field of black lung are innumerable. The most fundamental issues are related to what coal-mine working conditions should be like and how much coal miners with black lung should be compensated and by whom.

Apart from these core issues, certain policy problems regularly come up in claim adjudication: disputes regarding the credibility of medical evidence, especially from certain physicians; delays in the claim-adjudication process; and lack of legal representation for claimants. This Part will survey some of these issues and propose two pragmatic policy changes that would address many of the current problems.

First, we must eliminate the delays plaguing the adjudication of federal black lung benefits system. Many years can pass between the filing of a claim and a final decision, so elderly claimants often die before their claims are resolved. The delays also discourage attorneys from representing claimants because attorneys cannot be paid for their fees and costs until the award is final.

Second, the best promise of a massive change related to black lung is to shift the responsibility of black lung medical benefits from individual coal operators to a federal health insurance program that covers all coal miners. Because the medical benefits are often what motivate coal companies or their

---

<sup>105</sup> Work-product privilege is a conditional privilege that flows from the applicable rules of procedure. See *Hickman v. Taylor*, 329 U.S. 495 (1947).

insurers to aggressively litigate black lung benefits claims, taking these medical benefits off the table would decrease litigation. This option could also address separate health needs that coal miners face.

*A. A Brief Description of Policy Issues in the Federal Black Lung Benefits System*

1. Credibility of Expert Medical Evidence in Black Lung Claims

Much of the litigation and distrust in federal black lung benefits claims exists because each of the two parties do not believe the opposition's physicians. Coal miners dismiss the opinions of "company doctors," while coal companies dismiss miners' physicians as uninformed, activists, or both.

This issue became concrete in 2013 when reporters provided a thorough examination of a well-educated, well-trained, extensively-published radiologist at Johns Hopkins, Dr. Paul S. Wheeler.<sup>106</sup> The reporting showed that Dr. Wheeler had a systemic bias against claimants seeking black lung benefits. Reporters reviewed over 1,500 cases in which Dr. Wheeler provided a reading. In 800 of them, another doctor thought that the miner had CWP, but Dr. Wheeler did not. Dr. Wheeler never identified the severe form of CWP known as PMF, although another doctor did in 390 of the cases. The adjudicator credited Dr. Wheeler's opinion 70% of the time. If Dr. Wheeler were in fact more accurate than other readers, none of this would be problematic—but the reporters also showed that Dr. Wheeler was inaccurate. In over 100 cases, Dr. Wheeler failed to recognize CWP that was proven through more direct evidence (biopsies or autopsies).<sup>107</sup> This, combined with the fact that Dr. Wheeler never diagnosed PMF, suggested that Dr. Wheeler's readings were biased.

In response, the DOL division that initially adjudicates claims presumptively discredited Dr. Wheeler's readings<sup>108</sup> and informed 1,100 claimants whose claims were denied after Dr. Wheeler's reading that they may

---

<sup>106</sup> Chris Hamby et al., *Breathless and Burdened: Johns Hopkins Medical Unit Rarely Finds Black Lung, Helping Coal Industry Defeat Miners' Claims*, CTR. PUB. INTEGRITY (Jan. 13, 2015, 4:43 PM), <https://www.publicintegrity.org/2013/10/30/13637/johns-hopkins-medical-unit-rarely-finds-black-lung-helping-coal-industry-defeat>.

<sup>107</sup> *Id.*; see, e.g., Decision and Order Awarding Benefits Reopening Prior Claim, and Setting Entitlement Date, *G.F. v. Elk Run Coal Co.*, Case No. 2007-BLA-5984 (Dep't of Labor Feb. 9, 2009) (noting Dr. Wheeler's negative x-ray readings).

<sup>108</sup> U.S. DEP'T OF LABOR, BLBA BULL. NO. 14-09, WEIGHING CHEST X-RAY EVIDENCE THAT INCLUDES A NEGATIVE READING BY DR. PAUL WHEELER 2 (2014).

wish to refile for benefits.<sup>109</sup> Johns Hopkins shut down its black lung program and Dr. Wheeler retired.<sup>110</sup>

More important than any individual doctor or medical group is the widespread perception that medical experts in black lung benefits claims are biased. In response, some advocated for introducing the consensus opinion of panels of doctors.<sup>111</sup> Still, the effect of using a panel, or any other type of medical “neutral,” will depend on the personal views of the members of the panel or the individual serving as the neutral.

Instead, medical disputes should be resolved at two levels: (1) general, scientific questions should be resolved via rulemaking, and (2) specific, individualized questions should be resolved via the traditional tools of adversarial fact-finding—e.g., cross-examination and presentation of contrary evidence. The advantages of the rulemaking process for general, scientific questions are demonstrated by the agency’s recognition that coal-mine dust causes obstructive pulmonary impairments.<sup>112</sup> The process was thorough, involved a variety of scientific experts and stakeholders, and resulted in an official agency position on the scientific consensus—taking this general issue off the table in case-by-case litigation. But for case-specific questions (such as whether a miner’s tests were reliably conducted or how a medical consensus applies to a given miner) the process of adversarial litigation can determine a physician’s understandings and root out bias. The downside of depending on adversarial litigation is that the outcomes of claims vary depending on the legal skill of both the advocate and the physician. Many physicians understandably do not like to be cross-examined, so the adversarial process discourages many from participating in the process. However, as long as physicians exhibit such wide variation in determining the existence and effect of black lung, such individualized challenge—combined with agency resolution of generalized questions and external investigation from reporters and others—is the best guarantee of credible medical evidence.

---

<sup>109</sup> Chris Hamby, *Breathless and Burdened: Black Lung Claims by 1,100 Coal Miners May Have Been Wrongly Denied*, CTR. PUB. INTEGRITY (July 23, 2014, 9:50 AM), <https://www.publicintegrity.org/2014/07/22/15131/black-lung-claims-1100-coal-miners-may-have-been-wrongly-denied>.

<sup>110</sup> Matthew Mosk & Randy Kreider, *Amid Controversy, Johns Hopkins Quietly Drops Black Lung Program*, ABC NEWS (Sept. 30, 2015, 6:17 PM), <http://abcnews.go.com/US/amid-controversy-johns-hopkins-quietly-drops-black-lung/story?id=34161753>.

<sup>111</sup> See, e.g., The Black Lung Benefits Improvement Act of 2017, S.855, 115th Cong. § 109 (2017).

<sup>112</sup> See *supra* Section II.C.

## 2. Delays in Adjudication of Black Lung Benefits Claims

Black lung claims regularly go on for a decade,<sup>113</sup> some for two<sup>114</sup> or even three decades.<sup>115</sup> Most claims do not last that long, but even an average claim faces delays that often lead to elderly claimants dying before their claims are resolved.

After informal adjudication before the Department of Labor's Office of Workers' Compensation Programs ("OWCP"),<sup>116</sup> a formal hearing before the Office of Administrative Law Judges,<sup>117</sup> and appeals,<sup>118</sup> the active litigation of a deserving claim can easily take five years. If an adjudicator makes a mistake, which often happens, then a higher tribunal may remand the claim, potentially adding years to the process.<sup>119</sup>

Thankfully, claimants often receive interim benefits during this litigation. Once a claimant gets an award at a step in the process, if the coal company responsible for benefits refuses to pay while the appeal is pending (as they uniformly do), the Black Lung Disability Trust Fund starts advancing monthly monetary benefits and medical benefits until that award is vacated or final.<sup>120</sup> However, the Trust Fund cannot advance all past-due benefits to which the claimant is entitled (that is, benefits for the period from when the claimant's entitlement began to when an adjudicator first awarded benefits<sup>121</sup>—usually

<sup>113</sup> See, e.g., *Blue Mountain Energy v. Director, Director, OWCP* [Gunderson], 805 F.3d 1254, 1256 (10th Cir. 2015) (affirming miner's award after 14 years); *E. Associated Coal Co. v. Director, OWCP* [Vest], 578 F. App'x 165, 168 (4th Cir. 2014) (affirming miner's award after 13 years).

<sup>114</sup> See *Consolidation Coal Co. v. Latusek*, 717 F. App'x 207, 209–11 (4th Cir. 2018) (affirming awards of benefits from 1994 claim); see also Chris Hamby, *As Experts Recognize New Form of Black Lung, Coal Industry Follows Familiar Pattern of Denial*, CTR. PUB. INTEGRITY (May 19, 2014, 12:19 PM), <https://www.publicintegrity.org/2013/11/01/13653/experts-recognize-new-form-black-lung-coal-industry-follows-familiar-pattern-denial> (profiling Mr. Latusek's claim process as of 2013).

<sup>115</sup> *Wolf Creek Collieries v. Sammons*, 142 F. App'x 854, 855–56 (6th Cir. 2005) (referring to case as coal company's "Thirty Years War").

<sup>116</sup> U.S. DEP'T OF LABOR, NO. 05-17-003-01-060, EFFECT OF OALJ STAFFING LEVELS ON THE BLACK LUNG CASE BACKLOG 3 (2017), <https://www.oig.dol.gov/public/reports/oa/2017/05-17-003-01-060.pdf> [hereinafter STAFFING LEVELS].

<sup>117</sup> *Id.*

<sup>118</sup> U.S. DEP'T OF LABOR, NO. 05-15-001-50-598, PROCEDURAL CHANGES COULD REDUCE THE TIME REQUIRED TO ADJUDICATE FEDERAL BLACK LUNG BENEFIT CLAIMS 3 (2015), <https://www.oig.dol.gov/public/reports/oa/2015/05-15-001-50-598.pdf> [hereinafter PROCEDURAL CHANGES].

<sup>119</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-7, BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS' ABILITY TO PURSUE CLAIMS 15–16 (2009), <https://www.gao.gov/assets/300/297807.pdf> [hereinafter BLACK LUNG BENEFITS].

<sup>120</sup> I.R.C. § 9501(d)(1)(A)(i) (2017).

<sup>121</sup> *Id.* § 9501(d)(1)(A)(ii).

\$10,000 to \$50,000). Claimants are generally unable to receive these benefits until the award is final.

Apart from the claimants' delay in receiving past-due benefits, there are three other problems with the delays. *First*, requiring deserving claimants to endure years of litigation is unduly burdensome and creates the impression among claimants that their cases are not a priority.<sup>122</sup> *Second*, because most claimants are elderly, the long process means that many do not live to see the end of their claim. *Third*, because of a prohibition on private fee arrangements among claimants and attorneys,<sup>123</sup> claimants' attorneys cannot be paid until an award of benefits is final.<sup>124</sup>

### 3. Lack of Legal Representation for Claimants

As one might expect, due to the delays, many attorneys choose not to practice federal black lung benefits law. Black lung benefits claims also generally have a low probability of success. For 2017, only 18% of claims were approved at the first level (OWCP).<sup>125</sup> The idiosyncratic medical issues and potentially complex procedures further discourage even patient attorneys from representing clients with strong claims.<sup>126</sup>

Representation rates bear this out. For FY2017, only 40% of claimants have attorneys when their claims are at the first level.<sup>127</sup> 17% are represented by non-attorneys, often employees of medical providers who provide some limited representation through HRSA's black lung clinics program.<sup>128</sup> This means that

<sup>122</sup> Baker, *supra* note 66, at 1–2 (explaining the “common trend” of miners “end[ing] up disappointed, frustrated, and disenfranchised”).

<sup>123</sup> See 33 U.S.C. § 928(e) (2012); see also U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 726 (1990) (upholding constitutionality of this provision).

<sup>124</sup> Robert A. Campbell, United States Department of Labor v. Triplett: *Black Lung Claimants Will Continue to Suffer from a Lack of Legal Representation*, 93 W. VA. L. REV. 713, 725 (1991).

<sup>125</sup> Division of Coal Mine Workers' Compensation (DCMWC): *Black Lung Program Statistics*, U.S. DEP'T LABOR, <https://www.dol.gov/owcp/dcmwc/statistics/bls2017/PartCBlackLungClaimAdjudications.htm> (last visited Apr. 2, 2018).

<sup>126</sup> Baker, *supra* note 66, at 1.

<sup>127</sup> Division of Coal Mine Workers' Compensation (DCMWC): *Black Lung Program Statistics*, U.S. DEP'T LABOR, <https://www.dol.gov/owcp/dcmwc/statistics/AttorneyAndLayRepresentationOfClaimants.htm> (last visited Apr. 2, 2018) [hereinafter *Black Lung Program Statistics*]. Representation rates go up as claims advance the appellate ladder, but it is common for deserving claimants to be *pro se* even before the U.S. Courts of Appeals. See, e.g., Letter from Sherry J. Clark to the U.S. Court of Appeals for the Fourth Circuit, ECF No. 21, W. Va. CWP Fund v. Loudermilk, No. 13-2311 (4th Cir. Jan. 6, 2014) (a poignant letter by a claimant explaining her inability to find an attorney to defend her award—which the Court affirmed).

<sup>128</sup> *Black Lung Program Statistics*, *supra* note 127.

43% of claimants do not have any representation when they get the first decision in their claim, even though an attorney would be free to them.

#### 4. Three Problems with Proposals for Allowing Settlement of Black Lung Benefits Claims: Medical Benefits and the Statute

Disputed medical evidence, delayed adjudication, and insufficient representation have called for a variety of fixes. A frequently-mentioned idea is to allow parties to settle black lung benefits claims.<sup>129</sup> This would almost certainly reduce the delays and increase claimants' representation. There are, however, major policy concerns with encouraging settlement under the current benefits system. Three stand out in particular.

First, an award of black lung benefits to a miner includes generous medical benefits that cover the full cost of treatment related to the miner's respiratory impairment.<sup>130</sup> As discussed more thoroughly below,<sup>131</sup> the health insurance provided with black lung benefits to miners is often the more financially valuable part of the award. Most miners do not fully incorporate the value of the potential medical benefits because most miners are eligible for Medicaid or Medicare by the time they receive black lung benefits.<sup>132</sup> If miners could waive their black lung medical benefits through settlement, this would shift medical costs from private, industry-funded insurance to public insurance. And if a settlement regime did not allow medical benefits to settle, it would likely be unsuccessful because the party responsible for payment would retain much of the incentive to litigate.

The second major issue with settling miners' black lung benefits claims is the widow's benefits. Now that the ACA's automatic entitlement provision has relinked most widows' entitlement to benefits to the entitlement of their husband,<sup>133</sup> a widow's benefits must be confronted when considering settling a miner's claim. There are essentially three options for how a settlement could affect a widow's claim. *First*, the settlement could have no effect, and a widow who sought benefits would be required to prove (or settle) her own claim after the miner died without the benefits of the automatic entitlement provision. This would defeat the equity interest embedded in the ACA's provision and could produce *more* litigation in widow's claims. *Second*, the settlement could require the widow to join the settlement and waive her right to file a widow's claim.

---

<sup>129</sup> See BLACK LUNG BENEFITS, *supra* note 119, at 23; Baker, *supra* note 66, at 123–25; Brandon Kenney, *Recalibrating the Black Lung Benefits Program: Removing Systematic Procedural Barriers from Administrative Proceedings*, 18 U. PA. J. CONST. L. 329, 344–48 (2015).

<sup>130</sup> 20 C.F.R. § 725.701 (2017).

<sup>131</sup> See *infra* Section III.C.

<sup>132</sup> Black lung claimants are almost always either old enough to qualify for Medicare or poor enough to qualify for Medicaid.

<sup>133</sup> See *supra* Section II.B.1.

Apart from the fact that the value of a potential survivor's claim is inherently speculative, because the miner could remarry after the settlement, there is no way to ensure that all potential spouses would be a party to the settlement. *Third*, the settlement could be equivalent under the automatic entitlement provision to an award of benefits and result in derivative benefits for qualifying widows. This would decrease the value to coal companies or their insurers of settling claims and, as a result, lessen the incentive to settle. At the same time, because the monetary value of survivor's benefits is low<sup>134</sup> and does not include medical benefits,<sup>135</sup> the full value would not be unreasonably onerous.

And apart from the problem of medical and survivors' benefits, because the prohibition on settlement is written into the statute,<sup>136</sup> congressional action would be necessary. If the statute is going to be revised to make settlement possible, then something needs to be done about the medical benefits issues.

### *B. Reducing Delays in the Black Lung Benefits System*

Given these policy problems, the most pragmatic solution is to seek action to address delays within current law. As discussed above, many claimants do not live to see the resolution of their black lung claims.<sup>137</sup> This is a disgrace and represents a systemic failure to provide justice to the individuals for whom the system was meant to provide. The delays also serve as a direct impediment to claimant representation because the long timelines reduce the volume of new claims that attorneys can take and require them to advance the cost of their work.<sup>138</sup>

In the past few years, DOL has made some progress as a result of increased funding from Congress and suggestions from the Office of Inspector General.<sup>139</sup> These incremental, logistical efforts must be taken further.

---

<sup>134</sup> See *Division of Coal Mine Workers' Compensation (DCMWC): Black Lung Monthly Benefits Rates for 2018*, U.S. DEP'T LABOR, <https://www.dol.gov/owcp/dcmwc/regs/compliance/blbene.htm> (last visited Apr. 2, 2018).

<sup>135</sup> 20 C.F.R. § 725.701(a) (2017).

<sup>136</sup> See 33 U.S.C. § 915(b) (2012) ("No agreement by an employee to waive his right to compensation under this chapter shall be valid."); *id.* § 916 ("No assignment, release, or commutation of compensation or compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid. . . ."); see also *Ramey v. Director, OWCP*, 326 F.3d 474, 475 (4th Cir. 2003) (holding that "the Black Lung Benefits Act, . . . in plain and unmistakable terms, forbids the settlement of claims for black lung benefits").

<sup>137</sup> See *supra* Section III.A.2.

<sup>138</sup> See, e.g., BLACK LUNG BENEFITS, *supra* note 119, at 26 (stating that one law firm estimated that cases took two to four years to resolve and required an average of \$18,000 per case in legal costs).

<sup>139</sup> Compare STAFFING LEVELS, *supra* note 116, at 1, with PROCEDURAL CHANGES, *supra* note 118, at 5.



Remand procedure should be changed to address delay. Appellate bodies frequently remand black lung benefits claims where a remand is not truly necessary.<sup>140</sup> This is particularly notable in the Fourth Circuit, where many black lung claims arise and the court takes a circumscribed view of *SEC v. Chenery Corp.*<sup>141</sup> doctrine and its power to affirm black lung decisions on alternative grounds.<sup>142</sup> This is not legally necessary<sup>143</sup> and causes two problems. *First*, in the claim directly on review, the remand adds years to the claim and produces more work for the lower judges. *Second*, when appellate judges limit their review to what the ALJ said, this encourages ALJs to say a lot—often more than necessary. Routine ALJ decisions are often 30 to 40 single-spaced pages, which is part of why ALJ decisions take so long. Remands should be avoided where possible.

*C. Decoupling Medical Benefits from Black Lung Benefits and Creating a General Health Insurance Option for Coal Miners*

The medical benefits that accompany black lung benefits are often more substantial and uncertain than the monthly monetary benefits. Publicly-available statistics on current medical benefits costs are sparse, but in one of my recent cases, the medical costs (for less than 3.5 years) were \$289,331, while the monthly monetary benefits for the miner (who died while the claim was pending) were only \$52,231 (for 4.5 years). And black lung benefits can potentially be used to pay for lung transplantations,<sup>144</sup> which average \$1,190,700 each for a bilateral lung transplant.<sup>145</sup>

As a result, the potential medical benefits are often what motivate coal companies and their insurers to engage in aggressive, seemingly endless litigation. If these medical benefits are taken off the table, the amount of black lung benefits litigation would decrease, and deserving claimants could get their monthly monetary benefits more quickly.

This could also make settlement a more practical solution. As discussed above, one of the policy problems with settlement is that in agreements between

<sup>140</sup> See, e.g., Mattingly, *supra* note 81, at 823.

<sup>141</sup> 318 U.S. 80, 94–95 (1943).

<sup>142</sup> See *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426–27 (4th Cir. 2006); see also *Westmoreland Coal Co. v. Director, OWCP [Mabe]*, 662 F. App'x 213, 215 (4th Cir. 2016) (declining to consider alternative basis for affirmance even though the parties agreed on what the ALJ meant).

<sup>143</sup> Not all circuit courts take this strict view. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 357–59 (6th Cir. 2007) (Rogers, J., concurring) (noting *Henline* and providing reasons it misunderstands *Chenery* in the black lung context).

<sup>144</sup> David J. Blackley et al., *Lung Transplantation Is Increasingly Common Among Patients with Coal Workers' Pneumoconiosis*, 59 AM. J. INDUS. MED. 175, 176 (2016).

<sup>145</sup> T. SCOTT BENTLEY & STEVEN J. PHILLIPS, 2017 U.S. ORGAN AND TISSUE TRANSPLANT COST ESTIMATES AND DISCUSSION 3 (2017), <http://www.milliman.com/uploadedFiles/insight/2017/2017-Transplant-Report.pdf>.

individual miners and coal companies, the miner would not incorporate the full value of the medical benefits because the miner would eventually qualify for Medicare, which would likely cover most of the medical costs.<sup>146</sup> By removing the uncertainty related to future costs of health care, the parties could better predict the value of a given miner's claim. It would become a relatively simple function of the probability of success multiplied by the set monthly benefits amount and the number of months that the claimant and any survivors might expect to live.

This public insurance program that would replace the medical benefits provided by black lung benefits could also cover all coal miners—not just those who are already sick enough to qualify for benefits. Such a program would avoid problems such as the 2017 health insurance crisis faced by many former coal miners who receive their insurance through the United Mine Workers of America (“UMWA”).<sup>147</sup> Just as Congress appropriated \$1.3 billion to solve that crisis,<sup>148</sup> Congress should provide for the health needs of coal miners. Doing so would massively improve the federal black lung benefits system.

Who would pay for this program? If the public bore the full cost, the coal industry could further externalize the costs of the health problems for which it is responsible. But as the electrical mix moves away from coal, the industry is a shade of its former self and likely could not bear the full costs. The sensible solution is to pay for such insurance with a blend of general taxpayer revenue and an industry-specific tax. On the industry side, the coal industry should pay its fair share. On the public side, taxpayers should pay because the program would reduce the need for those miners to rely on programs such as Medicaid and Medicare, and it would help avoid crises like the 2017 appropriation to shore up the UMWA's insurance program.<sup>149</sup> Coal mined years ago fueled the steel mills and power plants that built 21st-century America. Even as the country's future power mix moves away from coal, the nation has a responsibility to provide health benefits for the coal miners who made this future possible.

---

<sup>146</sup> See *infra* Section III.A.4.

<sup>147</sup> See generally Noam Scheiber, *Retired Miners Lament Trump's Silence on Imperiled Health Plans*, N.Y. TIMES (Apr. 19, 2017), <https://www.nytimes.com/2017/04/19/business/economy/united-mine-workers-retiree-health-plan.html>.

<sup>148</sup> See Shauna Johnson, *Permanent Health Benefits Fix for Retired Coal Miners Part of Congressional Spending Plan*, METRO NEWS (May 1, 2017), <http://wvmetronews.com/2017/05/01/permanent-health-benefits-fix-for-retired-coal-miners-part-of-congressional-spending-plan/>; see also Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 div. M, tit. I, 131 Stat. 135, 800.

<sup>149</sup> See also Health Benefits for Miners Act of 2017, Pub. L. No. 115-31, 131 Stat. 135, 800 (May 5, 2017).

## IV. CONCLUSION

Black Lung should no longer exist, but its recent resurgence shows that it will be a reality for a minimum of decades more. MSHA's 2014 Dust Rule has the potential to bring disease rates back down, but the rule must be strictly enforced, and coal miners who are willing to demand safe conditions will need to be supported for the rule to meet its potential and the challenge of black lung. But even if the Dust Rule or other action could solve the problem for miners working now and in the future, the previous decades of inaction on excessive levels of coal-mine dust mean that the 21st century will continue to see thousands of miners with black lung. Federal black lung benefits law has seen major improvements to assist claimants in the past two decades, but there are still needs. The most immediate need is an end to the tortuous delays that make black lung claims drag on for enormous lengths. But to really remake the black lung benefits system for the better, Congress should consider an improved way to provide health insurance to coal miners so that black lung benefits will no longer need to cover medical treatment. Doing so would take pressure of the black lung benefits system. It also presents an opportunity to think more generally about how our society should ensure the health of coal miners who helped build our country.